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Federal Communications Commission

DA 04-2130

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Before the
Federal Communications Commission
Washington, D.C. 20554

2130

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 04-203
Table of Allotments,)	RM-10976
FM Broadcast Stations.)	
(McCook and Maxwell, Nebraska))	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: July 14, 2004

Released: July 16, 2004

Comment Date: September 7, 2004

Reply Date: September 21, 2004

By the Assistant Chief, Audio Division:

1. The Audio Division has before it for consideration the Petition for Rule Making filed by McCook Radio Group, LLC ("MRG"), licensee of Station KRKU(FM), McCook, Nebraska, and the Amendment to Petition for Rulemaking, filed jointly by MRG and Custer County Broadcasting, Inc., licensee of Station KBBN-FM, Broken Bow, Nebraska ("Custer," collectively, "Petitioners"). A *Notice of Proposed Rulemaking* was issued on May 28, 2004, seeking comment on the initial Petition for Rule Making.¹ Because the proposals in the amended petition raise issues not reflected in the *Notice of Rule Making* released May 28, 2004, we find that the circumstances warrant rescission of that *Notice* and issuance of this *Further Notice of Rule Making* in its place.²

2. Petitioners request amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, by reallocating Channel 253C1 from McCook, Nebraska, to Maxwell, Nebraska, and modifying Station KRKU(FM)'s license accordingly. According to the 2000 United States Census, Maxwell is an incorporated village with a population of 315 persons. Petitioner states that Maxwell has its own locally elected mayor and its own fire department, water department, post office, and public school system. Maxwell has two churches and several businesses, a youth center, campground, and various tourist attractions. The population of Maxwell increased 10.5 percent from 1990 to 2000. The community holds an annual festival in September, and has plans to build a new youth center and to undertake major improvements to the Town Hall.

3. MRG proposes to change the community of license for Station KRKU(FM) from McCook to Maxwell pursuant to Section 1.420(i) of the Commission's Rules, under the guidelines set forth in

¹ *McCook, Maxwell, and Broken Bow, Nebraska*, DA 04-1417 (released May 28, 2004).

² See 47 C.F.R. §§ 1.108 and 1.421.

*Modification of FM and TV Authorizations to Specify a New Community of License.*³ That decision establishes that, in evaluating a change of community proposal, we compare the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁴

4. MRG states that the proposed use of Channel 253C1 at Maxwell is mutually exclusive with the current use of Channel 253C1 at McCook. MRG notes that McCook, the current community of license for KRKU(FM), would not be deprived of its only local service because it currently receives local service from several FM and AM stations.⁵ Finally, MRG states that the provision of a first local service at Maxwell (Priority 3) should be preferred over the retention of multiple local services at McCook (Priority 4).

5. MRG states that the proposed 60 dBu contour for Channel 253C1 at Maxwell will provide service to 47,699 persons located in an area of 9,163 square kilometers, and that the existing facilities of Station KRKU(FM) at McCook, Nebraska, provide service to 19,623 persons in an area of 7,126 square kilometers. MRG represents that the relocation will result in a net gain of 28,076 persons within an area of 2,037 square kilometers. Petitioners have not stated whether there are areas within the current or proposed 60 dBu contour of Station KRKU(FM) where less than five aural reception services are or would be available. For each such area, Petitioners are requested to supply information regarding the number of services available and the area and number of persons served.

6. The proposed 60 dBu signal for KRKU(FM) at Maxwell does not cover any Urbanized Area. For that reason, no *Tuck* analysis will be necessary to evaluate this change of community proposal.⁶

7. In order to permit the allotment of Channel 253C1 at Maxwell, Petitioners propose a channel substitution for Station KBBN-FM at Broken Bow, Nebraska. In addition, Petitioners propose to upgrade the channel on which Station KBBN-FM operates. Petitioners thus propose to substitute Channel 237C2 for Channel 252C3 at Broken Bow, Nebraska, at the current transmitter site of Station KBBN-FM, Broken Bow, Nebraska, and to modify the license for

³ 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094 (1990).

⁴ 90 FCC2d 88, 91-92 (1982). The FM allotment priorities are the following: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. Equal weight is given to priorities (2) and (3).

⁵ Those stations are: KBRL(AM), KNGN(AM), KICX-FM, KIOD(FM), and KSWN(FM). Petitioner states that it also holds the licenses for KBRL(AM) and KICX-FM.

⁶ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988), and *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10,352 (1995).

Station KBBN-FM to specify operation on Channel 237C2 at Broken Bow. MRG has committed to reimburse Custer for all reasonable and prudent costs associated with the KBBN upgrade. Petitioners represent that if their requests are granted, they will file applications for Channel 253C1 at Maxwell, Nebraska, and for Channel 237C2 at Broken Bow, Nebraska, and will construct those facilities if the applications are granted.

8. As amended, the Petition for Rule Making now requests a non-adjacent channel upgrade for Station KBBN-FM to Channel 237C2. In order to make such a substitution, we must solicit competing expressions of interest for the proposed Channel 237C2 allotment at Broken Bow.⁷

9. This proposal warrants consideration because it could provide Maxwell with a first local broadcast transmission service. The proposed allotments could be made with the site restrictions and reference coordinates indicated below. Accordingly, we seek comment on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Broken Bow, McCook, and Maxwell, Nebraska:

Community	Present	Proposed
Broken Bow, Nebraska	252C3	237C2
Maxwell, Nebraska	----	253C1
McCook, Nebraska	230C2, 241C1, 253C1, 271C1, 280C2, 287C1	230C2, 241C1, 271C1, 280C2, 287C1

The Proposed Coordinates for Channel 253C1 at Maxwell, Nebraska are 41-04-44 NL and 100-31-28 WL, at center city coordinates with no site restriction.

The Proposed Coordinates for Channel 237C2 at Broken Bow, Nebraska are 41-23-49 NL and 99-37-02 WL, at a site 1.91 km (1.2 miles) east of Broken Bow.

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest, as set forth in paragraph 2 of the Appendix, is required before a channel will be allotted.

11. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on these proposals, and/or counterproposals in conflict with the allotment of Channel 237C2 at Broken Bow, on or before September 7, 2004, and reply comments on or before September 21, 2004, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W., TW-A325, Washington, D.C. 20554. Additionally, a copy of any filing should be

⁷ See *Modification of FM and Television Station Licenses*, 98 FCC2d 916 (1984). See also *Cheyenne, Wyoming*, 62 FCC2d 63 (1976).

served on counsel for the petitioners and parties, as follows:

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12. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Section 603 and 604 of the Regulatory Flexibility Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 Fed.Reg. 11549 (February 9, 1981).

14. For further information concerning this proceeding, contact Deborah A. Dupont, Media Bureau, at (202) 418-7072. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the

proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in the particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, **IT IS PROPOSED TO AMEND** the FM (TV) Table of Allotments, Section 73.202(b) (73.606(b)) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal discussed in the Notice of Proposed Rule Making to which this Appendix is attached. The proponent will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the Petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.